Supreme Court, U.S.
FILED
09-434 AUG 05 2009
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

COSTA T. VATHIS - PETITIONER,

vs.

STATE OF FLORIDA – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FLORIDA FIRST DISTRICT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

COSTA T. VATHIS

WAKULLA CORRECTION INSTITUTION

110 MELALEUCA DRIVE

CRAWFORDVILLE, FLORIDA 32327

QUESTIONS PRESENTED

I. IS A STATE POSTCONVICTION PETITIONER CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF COUNSEL?

II. IS A STATE POSTCONVICTION PETITIONER CONSTITUTIONALLY ENTITLED TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject to this petition is as follows.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal cases**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is yet reported; or,
[ ] is unpublished.

The opinion of the United States district court Appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is yet reported; or,
[ ] is unpublished.

[✓] For cases from **state cases**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at Fla. 1st DCA; or,
[ ] has been designated for publication but is yet reported; or,
[✓] is unpublished.

The opinion of the Second Judicial court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the highest state court decided my case was _____

[ ] No petition for rehearing was timely filed in my case,

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

[✓] For cases from state courts:

The date on which the highest state court decided my case was May 7, 2009.

A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The privilege of the Writ of habeas corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it.

- Art. I, 9, cl. 2, U.S. Const.

All the persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- Fourteenth Amendment, U.S. Const.

STATEMENT OF THE CASE

On June 13, 1997, petitioner was convicted of sexual battery on a child under 12 years of age (count 1) and lewd, lascivious, indecent assault (count 2).

On July 18, 1997, petitioner was sentenced on count one to a term of natural life imprisonment, with a twenty-five (25) year minimum mandatory. As to count two, petitioner was sentenced to three (3) years imprisonment to be served concurrently with count one.

Thereafter, petitioner perfected a timely direct appeal to the Florida First District Court of Appeal. On direct appeal, the petitioner's conviction and sentence were affirmed with opinion. See *Vathis v. State*, 729 So.2d 453 (Fla. 1st App. Dist. 1999).

In November of 1999, petitioner retained private counsel to pursue Postconviction remedies. On April 17, 2000, Attorney Jason M. Savitz of Robert Harper Law Firm visited the petitioner to discuss the issues to be presented in his state Postconviction motion. At that time, petitioner

informed Mr. Savitz his trial counsel's ineffectiveness in failing to preserve for appellate review the trial court's refusal to allow a read-back of testimony requested by the jury. Mr. Savitz agreed to present this issue in the motion for Postconviction relief.

The decision to raise this particular issue was predicated on several factors. At trial, the petitioner advanced an alibi defense and the time frame which the alleged victim testified to was a crucial part of that defense. The alleged victim testified that the "incident" occurred after the fireworks display. However, multiple witnesses testified at trial that the petitioner and his family departed after the fireworks.

During deliberations, the jury requested a read-back of the victim's testimony concerning the time frame within which the incident was alleged to have occurred. The trial judge stated that he felt he could not provide a read-back, and therefore denied the jury's request, without objection from petitioner's trial counsel.

On April 27, 2000, Mr. Savitz filed a motion for Postconviction relief with the state trial court, raising seven claims. However, inexplicably, Mr. Savitz omitted the aforementioned claim of ineffective assistance of trial counsel for failing to properly preserve the read-back issue for direct appeal.

On November 27, 2001, the state trial court denied the initial motion for Postconviction relief as legally insufficient. On appeal, the Florida First District Court of Appeal affirmed without opinion. See *Vathis v. State*, 829 So.2d 517 (Fla. 1st DCA 2003).

On March 18, 2005 a second motion for Postconviction relief in the state trial court, however, as with the initially filed motion, the second motion omitted the read-back issue. On September 11, 2007, the state trial court summarily denied the second motion for Postconviction relief.

On October 29, 2007, petitioner filed a petition for writ of habeas corpus in state court, alleging ineffective

assistance of his collateral counsel. On November 8, 2007, the state trial court rendered an order denying the motion as legally insufficient. Petitioner thereafter appealed to the First District Court of Appeal, which affirmed without opinion.

REASONS FOR GRANTING THE PETITION

Petitioner argues that his right to due process of law was violated by his Postconviction counsel's ineffective assistance. In this case, petitioner's retained collateral counsel filed two motions for Postconviction relief, each of which failed to raise the issue of trial counsel's failure to properly preserve for appellate review the trial court's refusal to provide the jury with a requested read-back of testimony.

The right to the effective assistance of counsel is predicated upon the right to counsel itself. The rationale is, if there is no right to counsel, there is no right to the effective assistance of postconviction counsel.

Many of the aforementioned courts base their holding that there is no right to postconviction counsel on this Court's ruling *in Pennsylvania v. Finley,* 481 U.S. 551 (1987). In *Finley,* this Court stated that theretofore, it had "never

held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions" in state courts, and this Court "decline[d] t so hold" at the time. *Finley, 481* U.S. at 555. However, this statement was dicta. In *Finley*, the state postconviction court appointed collateral counsel to represent the petitioner. Thus, *Finley* did not present or decide the question of whether collateral petitioners have a constitutional right to counsel. Appellant therefore argues that the question remains open.

Appellant asserts that the procedural due process component of the Fourteenth Amendment entitles collateral petitioners to the effective assistance of counsel.

i. Procedural Due Process

In *Ake v. Oklahoma, 470* U.S. *68* (1985), this Court established a three part test for assessing whether procedural due process requires the provision of a particular safeguard. The three *Ake* factors are (1) the private interest that will be affected by the action of the

state; (2) the governmental interest that will be affected if the safeguard is provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Ake, 470* U.S. at *77*. Petitioner will discuss each of these factors seratim.

1.
THE AFFECTED PRIVATE INTEREST

"The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." *Ake, 470 U.S.* at *78*. The accuracy of the underlying criminal proceeding is the central concern of state postconviction proceedings, and thus, militates heavily in favor of recognition of not only the right to collateral counsel but also to the right to the effective assistance of collateral counsel.

2.
THE AFFECTED GOVERNMENTAL INTEREST

"[I]t is difficult to identify any interest of the state, other than in its economy, that weighs against recognition of this right." *Ake,* 470 U.S. at 79. However, as this Court held in *Bounds v. Smith,* 430 U.S. 817 (1977), the "cost of protecting a constitutional right cannot justify its total denial." *Bounds,* 430 U.S. at 825. See also *Ake,* 470 U.S. at 79 (state has no legitimate interest in using its superior financial position for "maintenance of a strategic advantage. . . "). Moreover, as one pair of commentators have noted, "[t]he fact that many states provide postconviction counsel and expert and other essential financial assistance to state prisoners belies any claim that providing such resources is preclusively expensive." Hertz and Liebman, Federal Habeas Corpus Practice and Procedure, 4th Ed., pg. 355 (footnote omitted).

3.

THE PROBABLE VALUE OF THE PROCEDURAL SAFEGUARD AND THE RISK OF ERROR ABSENT THE SAFEGUARD

The third and final *Ake* factor also supports the recognition of a constitutional right to collateral counsel and the concomitant right collateral counsel's effective assistance.

"The value of the safeguard is, first, the likelihood that assistance of counsel...will enhance the reliability of postconviction review, hence of the underlying criminal proceedings. In addition, constitutional and other claims will be articulated more ably and presented more thoroughly by counsel. . . than by the usual pro se petitioner proceeding without such assistance, thus reducing the burden of Federal and State judges, who are forced to piece together unaided the legal and factual basis for a pro se petition." Hertz and Liebman, Federal Habeas Corpus Practice and Procedure, 5th Ed., pg. 366 (footnote omitted).

Furthermore, "representation by counsel will make postconviction review a more reliable device for correcting constitutional error. The importance of counsel in criminal

cases has long been acknowledged by the courts; indeed, the right to counsel was one of the first rights recognized as fundamental. Courts also have held that this right extends to complex civil cases brought by indigent prisoners - which a **fortiori** includes many postconviction proceedings in which the prisoners life or liberty is at stake. This is especially so given that the constitutional and other bases for challenging both convictions and sentences are often as difficult and sophisticated as the controlling theories in complex civil cases and are not so obvious that a layperson would easily recognize them." I.d., pg. 366-67 (footnotes and internal omitted).

ii. Meaningful Access to the Courts

Appellant further argues that the meaningful access to the court's component of the due process clause guarantees him the right to the effective assistance of collateral counsel. In *Bounds*, this Court recognized that prisoners have a constitutional right to meaningful access to State postconviction courts. The "right of access to the courts. . .

is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974). "It is clear that ready access to the courts is one of, perhaps **the,** fundamental constitutional rights." *Cruz v. Hauck, 475* F.2d 475, 476 (5th Cir. 1973).

Appellant argues that, given the complexity of postconviction proceedings, the federal constitution mandates the appointment of, and the effective representation by, counsel in most, if not all such cases. Very few lay persons are skilled in the knowledge of gleaning and framing legal contentions, the presentation of evidence, or the heady art of cross-examination, a necessary ritual in many state and federal evidentiary hearings. Under the circumstances, "[t]he right to be heard [will] be ...of little avail if it does not comprehend the right to be heard by counsel." *Powell v. Alabama,* 287

U.S. 45, 68-69 (1932). See also *Johnson v. Avery*, 393 U.S. 483 (1969) ("for the indigent as well as for the affluent prisoner, postconviction proceedings must be more than a formality").

iii. Equal Protection

In *Douglas v. California, 372* U.S. *708* (1961), this "Court held that the Equal Protection Clause required the states to provide appointed counsel for indigents pursuing first appeal as of right. [This] [C]ourt concluded that where the merits of **the one and only appeal** an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Hertz and Liebman, Federal Habeas Corpus Practice and Procedure, 5th Ed., pg. *383* (footnotes omitted), quoting *Douglas, 372* U.S. at *357.*

Petitioner points out that, as a matter of Florida law, postconviction proceedings provide the first and only available forum for raising most claims of ineffective assistance of trial counsel.

"In such circumstances, the convicted inmate whom. . .defense counsel has denied a meaningful opportunity to advance 'constitutional claims at trial. . .has not previously had an adequate opportunity to present his claims fairly in the context of the state's appellate process. Accordingly, state postconviction proceedings in which the prisoner is raising claims that are then available for the first time in any tate court are the functional equivalent of a first appeal as of right. In such circumstances, thc right to counsel. . . recognized in ***Douglas*** should apply." Hertz and Liebman, Federal Habeas Practice and Procedure, 5th Ed., pg. 384.

iv. Suspension Clause

The Suspension Clause of the Federal Constitution provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it.
> -Art. I, §9, cl. 2, U.S. Const.

This Court has recognized that the writ may be "suspended" through direct, as well as indirect means,

an example of the latter being the denial of access to legal assistance. *Johnson v. Avery,* 393 U.S. 483 (1969).

"[A] state effectively may suspend the writ by refusing to provide lawyers or other. . . assistance necessary under the circumstances to permit prisoners meaningfully to pursue State, then Federal postconviction proceedings effectively may deny a prisoner a meaningful ability to utilize available State procedures to test the legality of his conviction and sentence. Moreover, the state's failure to provide counsel to represent prisoners in filing State petitions for postconviction relief and other necessary. . . . assistance substantially impairs their right to meaningful federal habeas corpus review because state prisoners are not permitted to pursue federal remedies until state remedies are properly exhausted, and state prisoners may lose their statutory right to habeas corpus review or at least seriously compromise that right if they fail to

present claims and evidence in an appropriate manner in the state courts. Accordingly, by frustrating all available collateral remedies, the denial of counsel and other essential assistance...effectively may suspend the writ." Hertz and Liebman, Federal Habeas Corpus Practice and Procedure, 5th Ed., pg. 381-383 (emphasis original; footnotes omitted).

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 1996CF1260

vs. SPN NO. 97612

COSTA T. VATHIS,

Defendant

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND/OR MOTION TO FILE BELATED RULE 3.850 ISSUE- filed 10/29/07

THIS CAUSE came before the Court upon Defendant's pro se Petition for Writ of Habeas Corpus and/or Motion to File Belated Rule 3.850 Issue, filed on October 29, 2007, pursuant to Florida Rule of Criminal Procedure 3.850(h). The Court having considered the motion, having reviewed the court records, and being fully advised hereby makes the following findings:

APPENDIX B

On June 13, 1997, a jury found Defendant guilty of Sexual Battery on a Child Under 12 Years of Age (count 1) and Lewd, Lascivious, Indecent Assault (count 2). On July 18, 2007, Defendant was sentenced on count 1 to DOC incarceration for a term of natural life, as a capital offense requiring Defendant to serve at least 25 years of the sentence. On count 2, Defendant was sentenced to 3 years DOC incarceration, to run concurrently with count 1. Defendant filed a direct appeal, which was denied *per curiam* via mandate issued April 30, 1999 (First DCA case no. 1997-3228).

Defendant's former counsel filed a 3.850 motion, raising multiple grounds, on April 27, 2000. *Exh. 1- 4/27/00 Motion for Post Conviction Relief.* The motion was denied on November 27, 2001. Counsel filed a Motion for Rehearing on December 12, 2001, which the Court denied on September 11, 2002. Counsel then appealed the denial to the First DCA. The First DCA affirmed via mandate issued December 8,

2003. Vathis v. State, 859 So. 2d 517 (Fla. 1st DCA 2003). On March 18, 2005, counsel filed another 3.850 motion-on Defendant's behalf, which the Court denied on September 11, 2007. *Exh. 2- 3/18/05 Motion for Post Conviction Relief.*

Defendant now petitions for writ of habeas corpus and seeks to file a belated motion for post-conviction relief. Habeas corpus cannot be used as a means to seek a second appeal or to litigate issues that could have been raised in a Rule 3.850 motion. Baker v. State, 878 So. 2d 1236 (Fla. 2004). In accordance with Mills v. State, 901 So. 2d 939 (Fla.'4th DCA 2005), this Court has considered Defendant's petition for writ of habeas corpus and finds that Defendant is not entitled to file a belated 3.850 motion. Defendant cites Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999), and claims that he is entitled to a belated appeal because counsel did not include a particular claim in his 3.850 motion. Kehoe, however, is not dispositive in this case. Kehoe provides that a defendant may be

entitled to file a belated post-conviction motion when counsel fails altogether to file a timely motion for post-conviction relief. Id. at 934. Defendant's former counsel timely filed a post-conviction motion. See *Exh. 1.* Thus, Defendant's habeas corpus claim is legally insufficient.

WHEREFORE IT IS

ORDERED AND ADJUDGED that Defendant's Petition for Writ of Habeas Corpus, filed 10/29/07, is hereby **DENIED**, and Defendant's Motion to File a Belated Rule 3.850 Issue, filed 10/29/07, is hereby **DISMISSED.** Defendant has thirty days from the date of this Order in which to file a notice of appeal.

DONE AND ORDERED in chambers this 7th day of November, 2007.

KATHLEEN DEKKER

CIRCUIT JUDGE

Copies to, with attachments:

Costa T. Vathis- N02408
Wakulla Correctional Institution
110 Melaleuca Drive
Crawfordville, Florida 32327

State Attorney's Office, Leon County Courthouse

Attachments:

Exh. 1- 4/27/00 Motion for Post Conviction Relief
Exh. 2- 3/18/05 Motion for Post Conviction Relief